

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANNY GEROME YOUNG,

Plaintiff,

No. CIV S-03-2225 GEB KJM P

vs.

J. PULSIPHER, et al.,

Defendants.

ORDER AND

FINDINGS & RECOMMENDATIONS

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Plaintiff is a state prison inmate proceeding pro se with a civil rights action under 42 U.S.C. § 1983, alleging that between May 31, 2001 and October 9, 2002, defendants Pulsipher, a correctional lieutenant, and Steever, Bick and Andreasen, all doctors, were deliberately indifferent to his serious medical needs.<sup>1</sup>

Defendants have filed a motion for summary judgment.

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<sup>1</sup> Plaintiff's complaint includes a lengthy discussion of the authorities' perceived failure to provide adequate medical care as well as references to prior litigation on the subject, none of which is directly germane to the instant litigation. The allegations giving rise to this lawsuit begin at page seven of the narrative complaint, attached to the form complaint.

1 I. Facts<sup>2</sup>2 A. Medical Defendants

3 Plaintiff has been diagnosed with anklyosing spondylitis (AS), which is a chronic  
 4 inflammatory condition that affects the joints between the vertebrae of the spine and the joints  
 5 between the spine and the pelvis. It causes back pain, which is often eased by a bent-over  
 6 posture; this may lead to kyphosis (curvature of the thoracic spine). Because the condition is  
 7 rheumatic, it can cause inflammation in other joints and in organs, such as the eyes, heart,  
 8 kidneys and lungs. If the condition is progressive, it may lead to deterioration in the bone and  
 9 cartilage, causing fusion in the spine and other joints with chronic pain and a decrease in  
 10 mobility. MSJ, Ex. A ¶¶ 6-8 (Declaration of Dr. J. Bick).<sup>3</sup> Moreover, as the disease progresses,  
 11 the upper back tends gradually to stoop forward. Id., Ex. A ¶ 9.

12 Plaintiff's condition is progressive. Id., Ex. A ¶ 10. He was unable to tolerate  
 13 treatment with non-steroid anti-inflammatory drugs, but has been given medications, including  
 14 narcotics, for his pain. Id., Ex. A ¶ 10. In addition, he has been given physical therapy and a  
 15 number of supportive aids, including hot showers, soft shoes, cervical collar, wheelchair, cane,

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18 \_\_\_\_\_  
 19 <sup>2</sup> Both sides have submitted various medical records from plaintiff's California  
 20 Department of Corrections and Rehabilitation (CDCR) medical file. Although neither party has  
 21 established a foundation for the admissibility of the records, neither side objects to the others'  
 22 submission; indeed, both often rely on the same records. See, e.g., Motion for Summary  
 23 Judgment (MSJ), Ex. A ¶ 40, Attachment 26; Opposition (Opp'n), Declaration of Danny Gerome  
 24 Young (Young Decl.) ¶ 1 & Ex. A&A (both are 6/27/02 progress notes from Dr. Capozzoli).

25 Moreover, although the records may not be properly authenticated, based on both parties'  
 26 reliance on them and the fact that they appear to be plaintiff's medical records, the court will rely  
 on them in resolving the motion for summary judgment. See Fed. R. Evid. 901(a) & (b)(4).

27 Plaintiff does object to defendants' reliance on his deposition on the ground that he was  
 28 never given a copy to review and correct. Pl.'s Statement of Disputed Facts ¶ 31. Because the  
 29 deposition is not properly authenticated, the court will not consider it in resolving the motion.  
 30 See Orr v. Bank of America, NT & SA, 285 F.3d 764, 774 (9th Cir. 2002) (requirements for  
 31 authenticating a portion of a deposition).

32 <sup>3</sup> Defendants' exhibits are attached to their Statement of Undisputed Facts.

1 lower bunks and firm beds, though he has not consistently been given a firm bed. Id., Ex. A  
 2 ¶¶ 10-11; Opp’n, Young Decl. ¶¶ 8 & 28. A firm bed is important for the maintenance of posture  
 3 and to ease the pain of the disease. Opp’n, Ex. A&A.<sup>4</sup>

4 Plaintiff was housed at the California Medical Facility during the events described  
 5 in the complaint. Beginning at least as early as 1999, Dr. Andreasen signed medical chronos  
 6 recommending that plaintiff be given a firm bed and a lower bunk. MSJ, Ex. A ¶¶ 12-13 &  
 7 Attachments 1-2. In December 1999, an order was written, authorizing metal backing, or a  
 8 “cookie sheet” bed for plaintiff. Id., Ex. A, Attachment 2 at 2. Later in December, when  
 9 plaintiff complained that his bed did not comply with doctors’ orders, Dr. Andreasen wrote a  
 10 chrono authorizing the construction of a cookie sheet bed for plaintiff. Id., Ex. A ¶¶ 14-15 &  
 11 Attachments 3-4. Throughout the period covered by the complaint in this case, Dr. Andreasen  
 12 signed a variety of medical chronos authorizing the continuation of plaintiff’s cookie sheet bed  
 13 and other supportive aids. Id., Ex. A ¶¶ 16-19 & Attachments 5-8, 27.

14 In October 2000, plaintiff was moved to Wing M-1 and placed in bed 107L,  
 15 which had a cookie sheet mattress. Id., Ex. A ¶ 20 & Attachment 9. On May 31, 2001, plaintiff  
 16 and the other residents of Wing M-1 were moved to Wing H-2; plaintiff was placed in Bed No.  
 17 226L, which had springs rather than a cookie sheet.<sup>5</sup> Id., Ex. A ¶¶ 21-22; Young Decl. ¶ 8.

18 On July 18, 2001, plaintiff reported to Dr. Anderson that he had lost his cookie  
 19 sheet bed and so had placed his mattress on the floor. MSJ, Ex. A ¶ 24 & Attachment 11. Dr.  
 20 Anderson wrote a new chrono, co-signed by Dr. Andreasen, for a cookie sheet mattress or for  
 21 permission for plaintiff to put his mattress on the floor. Id., Ex. A ¶ 24 & Attachments 11-12.  
 22 Because the bunks were very close together in H-2, plaintiff was not able to put his mattress on  
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24 <sup>4</sup> Ex. A&A immediately follows Ex. A.

25 <sup>5</sup> The parties describe the springs differently: defendants call this a steel spring bed;  
 26 plaintiff insists that it is a “sagging spring” bed. Compare MSJ, Ex. A ¶ 22 and Young Decl. ¶ 8.  
 Whether the mattress was on steel or sagging springs is not dispositive.

1 the floor very often; if someone was in the upper bunk, that person would be unable to get down  
 2 from the bunk without stepping on plaintiff if he were on the floor. Young Decl. ¶ 10;  
 3 Declaration of Shawn LaCount (LaCount Decl.) ¶ 7.<sup>6</sup>

4 When plaintiff saw Dr. Enright, a psychiatrist, on August 23, 2001, he mentioned  
 5 that he did not have the proper mattress despite his medical chrono, but that he did not want to  
 6 file a grievance because it would get him into trouble. MSJ, Ex. A ¶ 26 & Attachment 15;  
 7 Opp'n, Ex. B-1. Plaintiff repeated his complaint when he saw his rheumatologist, Dr. Anderson,  
 8 on October 10, 2001, and again on November 29, 2001, when he saw his mental health case  
 9 manager, Dr. Thiem. MSJ, Ex. A ¶¶ 28-29 & Attachments 17-18. He told Dr. Thiem that he  
 10 was sleeping on the floor because it was not possible for him to get a metal bed. *Id.*, Ex. A,  
 11 Attachment 18.

12 On December 18, 2001, plaintiff told Dr. Anderson that staff members were not  
 13 respecting his medical chronos and asked the doctor to speak with the custody staff about this.  
 14 Dr. Anderson told him that "if chronos are not respected he can complain through usual channels  
 15 or I would be happy to speak to custody if they have questions." *Id.*, Ex. A ¶ 30 & Attachment  
 16 19.

17 On February 6, 2002, plaintiff submitted a Request for Reasonable  
 18 Accommodation (CDCR 1864) to Lieutenant Pulsipher, the program lieutenant for unit one,  
 19 asking that he be moved to bed J-153 (in J-Wing) because that bed had been specially designed  
 20 for him with hard steel backing. *Id.*, Ex. A ¶ 32; *id.*, Ex. B (Declaration of J. Pulsipher) ¶ 4  
 21 (worked in plaintiff's unit at time); Opp'n, Ex. Y(A).

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24 <sup>6</sup> The LaCount declaration and a declaration from Carlos Kinkeade are attached to  
 25 plaintiff's supplement to his pretrial statement, filed February 13, 2006. Because these  
 26 declarations are in the record and plaintiff refers to them in his opposition, the court may  
 consider them on summary judgment. Carmen v. San Francisco Unified School District, 237  
 F.3d 1026, 1029 (9th Cir. 2001).

1 A little over two weeks later, on February 23, 2002, plaintiff was moved to bed I-  
 2 332L, which had a cookie sheet mattress. Id., Ex. A ¶ 33, Attachment 9. Plaintiff had two more  
 3 bed changes on March 11, 2002, both to beds with springs. Id., Ex. A ¶ 34 & Attachment 9. He  
 4 was moved again on March 14, to bed J-109L in a dorm. Id., Ex. A ¶ 35. There, plaintiff could  
 5 not put his mattress on the floor because his bunk mate would not be able to get down without  
 6 stepping on plaintiff. Young Decl. ¶ 12. Eventually, he moved his mattress into a small space  
 7 used by the inmates as an exercise area. Kinkeade Decl. ¶ 8; LaCount Decl. ¶ 7.

8 On May 26, 2002, plaintiff wrote a letter to this court, complaining that he was  
 9 not being given a cookie sheet bed as specified by his medical chronos, and sent copies to  
 10 defendants Bick, Andreasen and Pulsipher. See Young v. California Medical Facility, Civ. No.  
 11 S-02-1172 WBS JFM P; Opp'n, Ex. Y.

12 On May 29, 2002, plaintiff complained about his bed to Dr. Steever. Although  
 13 Dr. Steever offered plaintiff a bed board, plaintiff rejected it and asked for a custom bed or the  
 14 bed called for in the medical chronos. Dr. Steever told plaintiff that it was outside his purview to  
 15 be "proactive" in obtaining a custom bed for plaintiff. MSJ, Ex. A ¶ 37 & Attachment 23;  
 16 Young Decl. ¶ 15.<sup>7</sup>

17 Several days later, on June 3, 2002, Dr. Andreasen wrote another chrono for a  
 18 cookie sheet bed or for permission for plaintiff to put his mattress on the floor. MSJ, Ex. A ¶ 38  
 19 & Attachment 24.

20 Plaintiff returned to see Dr. Steever on June 24, 2002. Dr. Steever told plaintiff  
 21 he had been unaware that a bed board and a cookie sheet were not the same thing. He offered to  
 22 write a chrono for a cookie sheet mattress, but learned that Dr. Andreasen had already done so.  
 23 Id., Ex. A ¶ 39 & Attachment 25.

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 25 <sup>7</sup> Plaintiff makes much of the fact that various chronos in his medical file show that a bed  
 26 board was not appropriate. See, e.g., Opp'n, Ex. I. It is not clear, however, that these chronos,  
 written during the 90s, were in front of Dr. Steever when he offered the bed board.

1 On June 27, 2002, plaintiff complained to Dr. Capozolli, a neurologist, about his  
2 problems in securing a cookie sheet mattress. He complained that he was in more pain and was  
3 embarrassed about his stooped posture. Dr. Capozolli noted that a rigid bed was appropriate for  
4 plaintiff and left a message for Dr. Andreasen about housing plaintiff in G-3 (or G-Wing), which  
5 had cookie sheet beds. Id., Ex. A ¶ 40 & Attachment 26; Young Decl. ¶ 16; Opp'n, Ex. A&A.  
6 G-3 houses inmates with particular housing needs associated with long-term chronic medical  
7 problems. Opp'n, Ex. Y-1 (Andreasen Interrogatory Response No. 6). Dr. Capozolli had taken  
8 similar action on January 4, 2000, when, after plaintiff complained of difficulties in obtaining his  
9 cookie sheet bed, Capozolli made a note to speak to Dr. Andreasen about it. Opp'n, Ex. H&H.  
10 Although Dr. Andreasen had the authority to write an order transferring an inmate to G-3, he did  
11 not believe plaintiff's medical problem required such a move. Opp'n, Ex. Y-1 (No. 6).

12 Plaintiff returned to Dr. Anderson on July 3, 2002 and complained that he had not  
13 received his cookie sheet mattress. Dr. Anderson confirmed that the appropriate chronos had  
14 been written and noted that "instituting cookie sheet is custody responsibility." MSJ, Ex. A ¶ 41  
15 & Attachment 27.

16 On September 6, 2002, Dr. Andreasen wrote a chrono noting that plaintiff should  
17 be given a cookie sheet mattress or be allowed to place his mattress on the floor. Id., Ex. A ¶ 44  
18 & Attachment 30; Opp'n, Ex. T.

19 On September 12, 2002, plaintiff attended an interdisciplinary mental health  
20 meeting and mentioned his frustration that "custody will not give me the bed I need." MSJ, Ex.  
21 A ¶ 45 & Attachment 31; Opp'n, Ex. S-1. The "treatment recommendations" included a plan for  
22 "CCI Miller [to] advocate for the cookie sheet mattress." Id.

23 The parties disagree about plaintiff's next bed move: defendants claim that on  
24 September 25, 2002, plaintiff was moved to a bed with springs; plaintiff says he was moved to  
25 the bed that had been constructed for him and had previously been at J-153. MSJ, Ex. A ¶ 46 &  
26 Attachment 9; Young Decl. ¶ 13. He remained there only two or three days. Young Decl. ¶ 13.

On September 25, 2002, plaintiff submitted a grievance, complaining that he was not being given the type of bed ordered by his doctors. MSJ, Ex. A ¶ 47 & Attachment 32.

On October 9, 2002, plaintiff was moved to Wing H-1 and given bed 120L, which had a cookie sheet mattress. *Id.*, Ex. A ¶ 48 & Attachment 9.

On October 20, 2002, Dr. Bick denied plaintiff's grievance on the first level because plaintiff had been given a cookie sheet bed in response to Dr. Andreassen's September 6 chrono. *Id.*, Ex. A, ¶ 50 & Attachment 32. According to Dr. Bick, as Chief Medical Officer, he was not responsible for ensuring that plaintiff was given a cookie sheet bed or for approving Dr. Andreassen's chronos; custodial staff were responsible for housing plaintiff in compliance with the chronos. Opp'n, Ex. G (Bick Interrogatory Response No. 6).

According to Dr. Bick, medical staff acted appropriately to accommodate plaintiff's needs in the custodial setting and claims there is

no compelling medical evidence to demonstrate that Young's condition suffered because of the actions or lack of actions in this case. This includes Young's subjective claim that having to periodically sleep on a bed other than one he finds acceptable for his condition, resulted in the loss of flexion in his neck.

MSJ, Ex. A ¶ 74. In contrast, plaintiff asserts that his struggles to secure a proper bed led to depression, loss of the range of motion in his spine and pain, all of which decreased after he was given a proper bed for an extended period of time. Opp'n, Exs. AAA<sup>8</sup> (Attachments 1 (notes of 2006 exam noting improved neck flexibility since 2002), 2(6/25/01 triage note re: pain)) & M-1 (interdisciplinary mental health notes reporting plaintiff's claims of depression).

#### B. Lieutenant Pulsipher

During the time covered by the complaint, Pulsipher was the Second Watch Program Lieutenant, working a shift from 6:45 a.m. until 2:45 p.m. MSJ, Ex. B ¶ 4.

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<sup>8</sup> This exhibit follows Exhibit Z. Plaintiff has labeled it A&A, but the court will refer to it as AAA because it is the second exhibit labeled "A&A."

1 The parties dispute the level of Pulsipher's involvement in housing matters:

2 Pulsipher avers that he had little day-to-day experience with inmate needs, such as plaintiff's  
3 need for a firm bed, and was not aware of all the medical orders for the inmates on the unit;  
4 plaintiff on the other hand says that, based on his experience as an institutional clerk, he knows  
5 that the unit lieutenants are responsible for signing off on cell moves and that he personally told  
6 Pulsipher about his medical needs on several occasions. *Id.*, Ex. B ¶ 6; Young Decl. ¶¶ 9, 13-14,  
7 17-18 & Ex. M-2.<sup>9</sup> Pulsipher acknowledges that plaintiff told him of plaintiff's need for a firm  
8 bed, but that every time Pulsipher checked into the matter, he found plaintiff to be appropriately  
9 housed. MSJ, Ex. B ¶ 7.

10 Pulsipher avers that he was not a part of the program change, which required the  
11 inmates on M-Wing, including plaintiff, to move to H-2 nor was he aware that when plaintiff was  
12 moved to H-2 he was not given a cookie sheet bed. He also avers that he was not even on duty  
13 during many of plaintiff's bed moves, was not required to authorize the moves and was not aware  
14 that plaintiff was often moved to a bed with springs. *Id.*, Ex. B ¶ 9. Plaintiff contends, however,  
15 that after he was moved to H-2, he asked Pulsipher's help in securing a cookie sheet bed. Young  
16 Decl. ¶ 9.

17 On February 6, 2002, as noted above, plaintiff submitted the CDC-1824, a  
18 Request for Reasonable Accommodation, asking for a cookie sheet bed. Pulsipher does not recall  
19 seeing or handling the form; plaintiff avers that he handed the form to Pulsipher and walked  
20 behind him as Pulsipher read it. MSJ, Ex. B ¶ 12; Young Decl. ¶ 4.

21 The parties dispute whether Pulsipher is responsible for plaintiff's bed moves.  
22 Pulsipher avers that sergeants dealt with the impact of medical orders on sleeping arrangements;  
23 plaintiff claims that he went to Pulsipher personally concerning his cell moves. MSJ, Ex. B ¶ 18;  
24 Young Decl. ¶¶ 14, 18.

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25 <sup>9</sup> This is not a chrono signed by Pulsipher, but rather a 1992 chrono about one of  
26 plaintiff's bed moves, signed by a different lieutenant. It is of limited relevance in this case.



Pulsipher asserts that sleeping on the floor is not appropriate from a custody point of view, but notes that even so, Unit One officers accommodated plaintiff's medical chronos and allowed him to sleep on the floor. MSJ, Ex. B ¶¶ 19-20. Plaintiff, however, contends that he did not have the room to sleep on the floor because of the limited space in the dorms to which he was assigned and because officers told him they could not see him when he was on the floor. Young Decl. ¶¶ 28, 30.

During the period between May 31, 2001 and October 9, 2002, plaintiff was given a bed with springs during four periods: from May 31, 2001 until July 6, 2001; July 7, 2001 until February 23, 2002; March 11, 2002 until May 1, 2002; and September 24, 2002 until October 9, 2002. MSJ, Ex. A, Attachment 9 & Ex. B ¶ 15.

## II. What Is Not Material In These Proceedings

Both parties present a wealth of evidence about events occurring after October 9, 2002. Plaintiff's medical care and housing before May 31, 2001 and after this October date is not relevant, because it is not covered in the complaint, unless it sheds light on dispositive issues. Moreover, as plaintiff notes in his opposition, the "issue in controversy" is so limited. Opp'n at 2.

Defendants present evidence about plaintiff's disruptive and assaultive behavior, which, they claim, often led to a cell-move for plaintiff; they intimate that plaintiff's problems with obtaining a cookie sheet bed were the result of his behavior. Predictably, plaintiff offers a rebuttal to this evidence. In fact, the only bed move made because of plaintiff's behavior during the time at issue was one on February 23, 2002, when plaintiff was moved from a bed with springs to a cookie sheet bed in administrative segregation. MSJ, Ex. A ¶ 78 & Attachment 9.

Plaintiff attacks Dr. Andreasen for writing chronos approving his transfer and Dr. Steever for refusing to give plaintiff pain medication on June 24, 2002. Id., Ex. A, Attachment 25; see also Pl.'s Statement of Disputed Facts ¶¶ 27 & 40. These claims were not included in the complaint. See Complaint (Compl.) at 10-13.

1 Plaintiff devotes some energy to demonstrating that Pulsipher gave the bed, which  
 2 had been retrofitted for plaintiff, to a “writ-writer” in order to appease the latter. Young Decl.  
 3 ¶ 11; Kinkeade Decl. ¶ 6; LaCount Decl. ¶ 4. Plaintiff was not entitled to the specific bed that  
 4 had been retrofitted, but rather to a bed that met his medical needs. Dobbin v. Artuz, 143  
 5 F.Supp.2d 292, 302 (S.D.N.Y. 2001).

6 In addition, plaintiff alleges Deputy Warden Valadez ordered Unit One to give  
 7 plaintiff bed J-153 and that he showed this order to Pulsipher; Pulsipher denies that such an order  
 8 exists. MSJ, Ex. B ¶ 13. The exhibit on which plaintiff relies for this claim does not support his  
 9 contention, for it is only an account of a determination that plaintiff did not belong in segregation  
 10 for refusing a bed move and could be released back to J-1, an event that occurred in 1998; it says  
 11 nothing about bed J-153. Opp’n, Ex. Y-1 at 1.

### 12 III. Standards For A Summary Judgment Motion

13 Summary judgment is appropriate when it is demonstrated that there exists “no  
 14 genuine issue as to any material fact and that the moving party is entitled to a judgment as a  
 15 matter of law.” Fed. R. Civ. P. 56(c).

16 Under summary judgment practice, the moving party  
 17 always bears the initial responsibility of informing the district court  
 18 of the basis for its motion, and identifying those portions of “the  
 19 pleadings, depositions, answers to interrogatories, and admissions  
 20 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). “[W]here the  
 21 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary  
 22 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers  
 23 to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered,  
 24 after adequate time for discovery and upon motion, against a party who fails to make a showing  
 25 sufficient to establish the existence of an element essential to that party’s case, and on which that  
 26 party will bear the burden of proof at trial. See id. at 322. “[A] complete failure of proof

1 concerning an essential element of the nonmoving party's case necessarily renders all other facts  
2 immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as  
3 whatever is before the district court demonstrates that the standard for entry of summary  
4 judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

5           If the moving party meets its initial responsibility, the burden then shifts to the  
6 opposing party to establish that a genuine issue as to any material fact actually does exist. See  
7 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to  
8 establish the existence of this factual dispute, the opposing party may not rely upon the  
9 allegations or denials of its pleadings but is required to tender evidence of specific facts in the  
10 form of affidavits, and/or admissible discovery material, in support of its contention that the  
11 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party  
12 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome  
13 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
14 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.  
15 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could  
16 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,  
17 1436 (9th Cir. 1987).

18           In the endeavor to establish the existence of a factual dispute, the opposing party  
19 need not establish a material issue of fact conclusively in its favor. It is sufficient that "the  
20 claimed factual dispute be shown to require a jury or judge to resolve the parties' differing  
21 versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary  
22 judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a  
23 genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory  
24 committee's note on 1963 amendments).

25           In resolving the summary judgment motion, the court examines the pleadings,  
26 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

On May 26, 2004, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998); Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

#### IV. Analysis

In Estelle v. Gamble, 429 U.S. 97, 106 (1976), the Supreme Court held that inadequate medical care did not constitute cruel and unusual punishment cognizable under section 1983 unless the mistreatment rose to the level of "deliberate indifference to serious medical needs."

In the Ninth Circuit, the test for deliberate indifference consists of two parts. First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong-defendant's response to the need was deliberately indifferent-is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference. Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.

Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations & quotations omitted); see

1 also McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir.1992), overruled in part on other grounds,  
2 WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir.1997).

3           There is no Eighth Amendment violation if any delay in treatment is not harmful.  
4 Shapely v. Nevada Bd. Of State Prison Com'rs., 766 F.2d 404, 407 (9th Cir. 1985). However,  
5 unnecessary continuation of pain may constitute the “harm” necessary to establish an Eighth  
6 Amendment violation from delay in providing medical care. McGuckin, 974 F.2d at 1062.

7           A showing of merely inadvertent or even negligent medical care is not enough to  
8 establish a constitutional violation. Estelle, 429 U.S. at 105-06; Frost v. Agnos, 152 F.3d 1124,  
9 1130 (9th Cir. 1998). A difference of opinion about the proper course of treatment is not  
10 deliberate indifference nor does a dispute between a prisoner and prison officials over the  
11 necessity for or extent of medical treatment amount to a constitutional violation. See, e.g.,  
12 Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th  
13 Cir. 1989).

14           A medical need is serious if failure to treat the condition could cause further  
15 significant injury or the unnecessary and wanton infliction of pain. McGuckin, 974 F.2d at 1059.

16           The existence of an injury that a reasonable doctor or patient would find  
17 important and worthy of comment or treatment; the presence of a medical  
18 condition that significantly affects an individual's daily activities; or the  
19 existence of chronic and substantial pain are examples of indications that a  
20 prisoner has a “serious” need for medical treatment

21 Id. at 1060.

22           Defendants have no quarrel with the proposition that AS is a serious medical  
23 condition, requiring treatment. Mem. P. & A. in Supp. Mot. for Summ. J. at 7.

24           A. Dr. Steever

25           The undisputed evidence shows that on one occasion, Dr. Steever offered plaintiff  
26 a bed board that did not meet his medical needs and that when he learned of his mistake, he  
offered to write a chrono for a cookie sheet bed. MSJ, Ex. A ¶¶ 37 & 39. That Dr. Steever was  
wrong about a bed board on one occasion does not show deliberate indifference, particularly in

1 light of his subsequent offer to write a chrono for a cookie sheet bed. Estelle, 429 U.S. at 105-  
2 06.

3           The evidence does show that Dr. Steever declined to be proactive in obtaining a  
4 custom bed for plaintiff because it was outside his purview. Plaintiff has presented nothing  
5 suggesting what Dr. Steever could have done beyond writing a chrono, which would have been  
6 duplicative of the chronos written by Dr. Anderson and Dr. Andreasen; he has not offered  
7 evidence showing what authority, if any, Dr. Steever had over his placement or even that his  
8 being “proactive” would have resulted in plaintiff’s being assigned to a cookie sheet bed. Dr.  
9 Steever is entitled to summary judgment.

10           B. Dr. Bick

11           Although plaintiff sent copies of correspondence about his bed to Dr. Bick, the  
12 evidence he has submitted in opposition to summary judgment shows that Dr. Bick, the Chief  
13 Medical Officer, was not responsible for ensuring that plaintiff was given a cookie sheet bed.  
14 Once the chronos were written, it was the responsibility of the custody staff to see that the orders  
15 were carried out. Opp’n, Ex. G (No. 6). By the time Dr. Bick denied plaintiff’s grievance, on  
16 October 20, 2002, plaintiff had a cookie sheet bed. MSJ, Ex. A, Attachment 9. Dr. Bick is  
17 entitled to summary judgment.

18           C. Dr. Andreasen

19           The undisputed evidence shows that Dr. Andreasen wrote a number of chronos for  
20 a cookie sheet bed or for authorization for defendant to sleep on the floor when he did not have  
21 such a mattress. See, e.g., MSJ, Ex. A, Attachments 11, 12 & 24. The undisputed evidence also  
22 shows that plaintiff made a number of complaints to medical staff that he was not being given the  
23 bed called for in the chronos and that staff often noted it was the responsibility of the custody  
24 staff to act on the chronos. See MSJ, Ex. A, Attachment 27 (7/3/02 visit to Dr. Anderson, who  
25 noted that “instituting cookie sheet is custody responsibility”).

26 /////

1           What makes Dr. Andreassen's situation different is that he had the authority to  
2 transfer plaintiff to G-3, a medical wing with cookie sheet beds. Opp'n, Ex. Y-1 (Andreassen  
3 Interrogatory Response No. 6). In fact, Dr. Capozzoli, plaintiff's neurologist, sought Dr.  
4 Andreassen's consent to have plaintiff transferred to G-3. Opp'n, Ex. H&H. Although Dr.  
5 Andreassen says that plaintiff's medical problem did not require such a move, there is no  
6 explanation for this conclusion. Moreover, the fact that custody staff were responsible for acting  
7 in compliance with the chronos may not absolve Dr. Andreassen from liability when he had the  
8 authority to transfer plaintiff to a wing where his medical needs would be met. Scott v. Garcia,  
9 370 F.Supp.2d 1056, 1070-71 (S.D. Cal. 2005).

10           In addition, there is disputed evidence concerning the impact of plaintiff's  
11 bedding on his medical condition: according to plaintiff, being forced to sleep on a bed with  
12 springs, whether steel or sagging, caused him pain and depression and decreased flexion in his  
13 neck; according to Dr. Bick, there is no objective evidence of any impact on plaintiff's health.

14           Accordingly, there is a triable issue of fact as to whether Dr. Andreassen was  
15 deliberately indifferent to plaintiff's serious medical needs.

16           Dr. Andreassen also argues, though, that he is entitled to qualified immunity.  
17 Government officials performing discretionary functions generally are shielded from liability for  
18 civil damages insofar as their conduct does not violate clearly established statutory or  
19 constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457  
20 U.S. 800, 818 (1982).

21           In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court set forth a particular  
22 sequence of questions to be considered in determining whether qualified immunity exists. The  
23 court must consider this threshold question: "Taken in the light most favorable to the party  
24 asserting the injury, do the facts alleged show the officer's conduct violated a constitutional  
25 right?" Id. at 201. If no constitutional right was violated if the facts were as alleged, the inquiry  
26 ends and defendants prevail. Id. The court has found that the disputed evidence with regard to

1 Dr. Andreasen's declining to exercise his authority to transfer plaintiff to G-3 creates a disputed  
2 issue of fact.

3 If, however,

4 a violation could be made out on a favorable view of the parties'  
5 submissions, the next, sequential step is to ask whether the right  
6 was clearly established.... 'The contours of the right must be  
7 sufficiently clear that a reasonable official would understand that  
8 what he is doing violates that right.'... The relevant, dispositive  
9 inquiry in determining whether a right is clearly established is  
10 whether it would be clear to a reasonable officer that his conduct  
11 was unlawful in the situation he confronted.

12 Id. at 201-02 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The reasonableness of  
13 a defendant's conduct is judged "against the backdrop of the law at the time of the conduct."

14 Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 599 (2004). The defendant should not  
15 be subject to liability if the law at that time did not clearly establish that the defendant's actions  
16 would violate the Constitution. Id. The Supreme Court has emphasized that "the qualified  
17 immunity inquiry must be undertaken in light of the specific context of the case." Id. The court  
18 must determine whether the contours of the right were sufficiently clear that a reasonable official  
19 would understand that what he was doing violated that right. Anderson, 483 U.S. at 640.

20 "Sufficient clarity" for the purposes of the qualified immunity inquiry does not require precedent  
21 directly on point; it is sufficient if "unlawfulness is apparent in light of preexisting law. . . ."

22 Devereaux v. Abbey, 263 F.3d 1070, 1075 (9th Cir. 2001) (quoting Giebel v. Sylvester, 244 F.3d  
23 1182, 1198 (9th Cir. 2001)).

24 At the time at issue in this action, the requirement that prison doctors not act with  
25 deliberate indifference to a prisoner's serious medical needs was well established. See Estelle,  
26 429 U.S. at 104-05. Based on the evidence before the court, a jury might find Dr. Andreasen  
should have been aware that declining to transfer plaintiff to G-3 where he would have consistent  
access to a cookie sheet bed, in light of the fact that his chronos for a cookie sheet bed were not

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1 being followed, might cause plaintiff pain. Dr. Andreasen therefore is not entitled to qualified  
2 immunity.

3 D. Lieutenant Pulsipher

4 Plaintiff argues that summary judgment is not appropriate at this time because  
5 Pulsipher's affidavit demonstrates that more discovery is essential. Opp'n at 9-10; see Fed. R.  
6 Civ. P. 56(f).

7 Rule 56(f) of the Federal Rules of Civil Procedure permits a court to deny or  
8 continue determination of a motion for summary judgment "should it appear from the affidavits  
9 of a party opposing the motion that the party cannot for reasons stated present by affidavit facts  
10 essential to justify the party's opposition." A party's failure to comply with the requirements of  
11 the rule is a proper ground for denying discovery and proceeding to summary judgment.

12 Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986).

13 Plaintiff's Rule 56(f) request is included in his memorandum of points and  
14 authorities in opposition to the motion for summary judgment, not in a separate document and  
15 not supported by an affidavit. Opp'n at 10. Nevertheless, this opposition is sufficient to raise  
16 discovery concerns for the court's consideration. Garrett v. City And County of San Francisco,  
17 818 F.2d 1515, 1518-19 (9th Cir. 1987); Program Engineering, Inc. v. Triangle Publications, Inc.,  
18 634 F.2d 1188, 1193 (9th Cir. 1980).

19 First, plaintiff claims that Pulsipher failed to comply with this court's December  
20 29, 2005 order granting plaintiff's motion to compel in part and directing Pulsipher to produce  
21 materials on the need to ensure that the transfer of inmates from M-1 to H-2 would not result in a  
22 disruption of any of their medical needs. Plaintiff claims Pulsipher gave plaintiff a copy of  
23 orientation materials given to new inmates when they arrive at CMF, which had nothing to do  
24 with the request. Opp'n at 10 & Ex. K-1.

25 Plaintiff also argues that documentation on the move must have been generated,  
26 because Pulsipher mentions an "organization" that was in charge of the move. See MSJ, Ex. B

¶ 10 (the movement of inmates from M-1 to H-2 was the result of “a program change of which I was neither consulted nor was I assigned to the organization of the program change.”). It appears that Pulsipher is not using the word “organization” to mean a group or entity, but rather the action or process of organizing; the group plaintiff believes must have generated documents did not necessarily exist. Nevertheless, the court is troubled by Pulsipher’s response to the motion to compel, for if he in fact produced the “Mission Statement” included as Exhibit K-1 to the opposition, it was not responsive to the court’s order. Defendant has not disputed plaintiff’s characterization of what he provided plaintiff, but rather has simply argued that plaintiff is attempting to relitigate the motion to compel. Reply at 2-3.

In addition, plaintiff has suggested that even if Pulsipher was not involved in planning the move, his position as Program Lieutenant means he would have been given any memoranda or other documents relating to the move because the move disrupted programming on the unit. Any documents about the continuity of care and the distribution list for such documents would assist plaintiff in showing that Pulsipher was aware of plaintiff’s need for a cookie sheet bed.

Second, plaintiff argues that in light of Pulsipher’s claim that he investigated plaintiff’s complaints about his bed on several occasions, he needs information about the investigation, including copies of documents Pulsipher reviewed and the names of the people he interviewed, if any. Opp’n at 12; see MSJ, Ex. B ¶ 7. He contends that he was not alerted to Pulsipher’s claim that he investigated because Pulsipher’s response to interrogatories did not mention any investigation. Opp’n at 12.

Pulsipher’s position in the pending summary judgment motion is that he had little day-to-day contact with things like housing moves or needs for special beds and that these issues were routinely handled by his staff without his involvement. He also relies on his assertion that he was aware of plaintiff’s need for a cookie sheet bed only through plaintiff’s verbal complaints.

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MSJ, Ex. B ¶¶ 6, 9. The discovery plaintiff seeks will support his opposition to the motion for summary judgment and is, accordingly, appropriate in this case. Garrett, 818 F.2d at 1519.

IT IS HEREBY ORDERED that:

1. Defendant Pulsipher's motion for summary judgment is denied without prejudice to being renewed following the limited reopening of discovery.

2. Within thirty days of the date of this order, defendant Pulsipher is ordered to provide plaintiff with documents on the need to ensure the transfer of inmates from M-1 to H-2 in May 2001 would not result in a disruption of any of their medical needs, including the distribution list for any such document, and with any documents Pulsipher consulted and the names of people he interviewed when he investigated plaintiff's complaints about his bed. If no such information exists, defendant should so notify plaintiff.

3. Any motion to compel, limited solely to the two categories of evidence described in 2 above, are due fifteen days after plaintiff receives the documents, with opposition due thirty days after any such motion to compel is filed, and any reply fifteen days after the opposition is filed.

4. Defendant Pulsipher's renewed motion for summary judgment, if any, is due within thirty days after the resolution of any motion to compel or thirty days after the expiration of the time for filing a motion to compel. Opposition is due thirty days thereafter, and the reply fifteen days after the opposition is filed.

IT IS HEREBY RECOMMENDED that the motion for summary judgment be granted as to defendants Bick and Steevers and denied as to defendant Andreassen.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

1 shall be served and filed within ten days after service of the objections. The parties are advised  
2 that failure to file objections within the specified time may waive the right to appeal the District  
3 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: February 1, 2007.

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U.S. MAGISTRATE JUDGE

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